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CHRISTOPHER A. PRINE  
Clerk

Christopher A. Prine  
Clerk, Fourteenth Court of Appeals  
301 Fannin, Suite 245  
Houston, Texas 77002

RE: *The State of Texas v. Marc Wakefield Dunham*  
Fourteenth Court of Appeals No. 14-17-00098-CR  
Trial Court Cause Number: 2109329

Dear Honorable Justices Boyce, Donovan, and Wise:

The Court submitted this case to a panel consisting of Justices Boyce, Donovan, and Wise after hearing argument on February 14, 2018. I write this letter pursuant to Texas Rules of Appellate Procedure 2 and 38.7 and respectfully request that the Court grant leave to file it as a post-submission letter brief.

During argument this panel inquired about what the Court of Criminal Appeals would hold in *O'Brien v. State*, 482 S.W.3d 593 (Tex. App.—Houston [1st Dist.] 2015, pet. granted) regarding the unanimity issue raised by the appellant. On May 2, 2018, the Court of Criminal Appeals affirmed the First Court of Appeals' decision in *O'Brien*. See *O'Brien v. State*, PD-0061-16, 2018 WL 2068649 (Tex. Crim. App. May 2, 2018).

As the appellant points out in his post-submission letter brief, the Court of Criminal Appeals held that jury unanimity is not required with respect to the enumerated offenses in an engaging in organized criminal activity. In making this holding, the Court analyzed the statute and found that the gravamen in engaging in organized criminal activity is a "circumstance surrounding the conduct." *O'Brien*, 2018 WL 2068649 at \*9-13. The Court found that the jury must be unanimous that defendant committed one of the enumerated offenses *as part of a collaboration to carry on criminal activities*, and it was this "something more" that points to it being a "circumstances surrounding the conduct" offense. *Id.*

While *O'Brien* involves a different statute and thus, is not binding on this Court's analysis of the deceptive business practices statute, this Court can gain guidance from the Court of Criminal Appeals' analysis. As discussed in the State's briefing to this Court, it is the circumstance of being engaged in a business practice surrounding the enumerated deceptive acts that makes the deception illegal. See TEX. PENAL CODE § 32.42(b) (West). Thus, unanimity is required about the existence of that particular circumstance that makes the otherwise innocent act criminal and unanimity is not required with respect to the enumerated deceptive acts. See *Young v. State*, 341 S.W.3d 417, 423-4, 427-8 (Tex. Crim. App. 2011).

Additionally, the Court of Criminal Appeals, like the First Court of Appeals, focused on the Legislature's use of the phrase "one or more of the following," finding that it demonstrates the Legislature's focus upon the circumstances surrounding the conduct, rather than upon a specific predicate offense. The Court found:

By including the phrase "one or more of the following" in the statute, the Legislature demonstrated that it was not as focused upon the commission of a specific predicate offenses as it was upon organized crime. Interpreting the engaging statute as a "nature of conduct" offense would, as the court of appeals noted, render the Legislature's use of the phrase "one or more of the following" meaningless.

See *O'Brien*, 2018 WL 2068649 at \*9; see also TEX. PENAL CODE § 32.42(b) (West) (using the phrase "one or more of the following" prior to listing the enumerated acts of deception). Thus, requiring unanimity for each enumerated deceptive business practice would likewise render the same phrase of "one or more of the following" in Section 32.42(b) meaningless.

Moreover, similar to the acts pled in *O'Brien*, the acts pled in the present case are of the same degree and thus, there is not a due process concern requiring unanimity. See *O'Brien*, 2018 WL 2068649 at \*14 n. 89 (noting offenses chosen were of same degree and thus, jury unanimity was not required by due process; however, leaving open the question if two or more offenses pled were of different degrees). Accordingly, the trial court did not err in refusing to instruct the jury that it must agree unanimously that the appellant committed the same specific act of deception.

Sincerely,

/s/ Katie Davis

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